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Report of the Special Rapporteur on the independence of judges and lawyers*

Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the report of the Special Rapporteur on the independence of judges and lawyers, Diego García-Sayán, prepared pursuant to Council resolution 26/7. The report is the first submitted by the Special Rapporteur since his appointment on 5 December 2016.

In the report, the Special Rapporteur presents his perspective on the mandate. In doing so, he recalls the origins of the mandate and its framework, and the role of the Special Rapporteur. He then presents an overview of the thematic work of his predecessors. Finally, he presents a few specific issues of concern that he will pay particular attention to during his tenure, particularly the issue of corruption and organized crime.

* The present document was submitted late so as to reflect the latest information.

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I. Introduction

1. The present report is the first submitted by the Special Rapporteur on the independence of judges and lawyers, Diego García-Sayán, since his appointment in December 2016 pursuant to Human Rights Council resolution 26/7. In his report, the Special Rapporteur establishes the main issues he will prioritize during his tenure. It consists of three parts. The first section provides an overview of the mandate and its methods of work with States, civil society, United Nations bodies and relevant stakeholders. The second part provides a summary of the thematic work of previous Special Rapporteurs. The third part identifies some issues of specific concern that the Special Rapporteur will take into account during his mandate, particularly issues related to corruption and organized crime, among others.

2. The Human Rights Council, aware of the connection between human rights and the independence of judges and lawyers, has repeatedly underlined the importance of an independent judiciary. In resolution 29/6, the Council reiterated the conviction that an independent and impartial judiciary, an independent legal profession, an objective and impartial prosecution able to perform its functions accordingly and the integrity of the judicial system are essential prerequisites for the protection of human rights and the application of the rule of law and for ensuring fair trials and the administration of justice without any discrimination.

3. The Human Rights Council has repeatedly requested the Secretary-General, within the limits of the regular budget of the Organization, to provide the Special Rapporteur with all the necessary human and financial resources for the effective fulfillment of his or her mandate.[1]

4. The Special Rapporteur would like to thank the Human Rights Clinic of the Human Rights Research and Education Centre of the University of Ottawa for its outstanding support in the research for and drafting of the present report.

II. Perspectives on the mandate of the Special Rapporteur on the independence of judges and lawyers

5. The Special Rapporteur would like to acknowledge the outstanding work done by his predecessors in this position, Mónica Pinto, Gabriela Knaul, Leandro Despouy and Param Cumaraswamy.

6. The mandate of the Special Rapporteur on the independence of judges and lawyers has been gradually built over the years thanks to the interpretation of its scope and content, enshrined most recently in Human Rights Council resolution 29/6. As the Special Rapporteur stated in 2016, each Special Rapporteur, in his or her own field of action, has helped through the periodic thematic reports to clarify and consolidate the requirements necessary to achieve and maintain the independence and impartiality of the justice system.

7. The present Special Rapporteur intends to perform his task taking into consideration the valuable work of his predecessors while addressing specific topics of current relevance. For example, during the course of his tenure the Special Rapporteur would like to focus his attention on the impact of corruption, organized crime and other transnational threats on the judiciary. The Special Rapporteur will elaborate on this issue in his future thematic reports.

8. Upon review of the approach of previous mandate holders on the issue of corruption (see, for instance, E/CN.4/2002/72/Add.1, A/HRC/4/25, A/HRC/11/41, A/64/181, A/65/274, A/HRC/20/19, A/67/305, A/HRC/23/43 and Corr.1 and A/70/263), the Special Rapporteur is of the view that the impact of corruption and organized crime on the judiciary needs to be considered in further detail. During his term in office, the Special Rapporteur will work closely with States, United Nations agencies and bodies, national human rights

[1] See, for instance Council resolution 26/7.

institutions, academia and civil society organizations to elaborate strategies and approaches aimed at preventing the harmful influence of corruption and organized crime on the judiciary.

A. Mandate of the Special Rapporteur on the independence of judges and lawyers

1. Origins of the mandate and commitment of the international community

9. The mandate of the Special Rapporteur on the independence of judges and lawyers is derived from the concern expressed by the Commission on Human Rights at the frequency of attacks on judges, lawyers and court officials and the link it noted existed between the weakening of safeguards for the judiciary and lawyers and the gravity and frequency of human rights violations. It was established in resolution 1994/41 and last renewed by the Human Rights Council in resolution 26/7. In the first report of the mandate (E/CN.4/1995/39), the Special Rapporteur provided a detailed historical background in order to situate the mandate in the context of the considerable work which had been accomplished up until that time in elaborating international standards and seeking full respect for them. This historical background was recalled in a later report of the Special Rapporteur to the Human Rights Council (A/HRC/32/34).

10. A solid international legal framework supports the purpose of the mandate. International and regional instruments relating to the scope of the mandate were first listed by the Special Rapporteur in his first report and interpreted, contextualized and applied by the successive mandate holders over more than 20 years. New instruments, such as the Rome Statute of the International Criminal Court, the United Nations Convention against Corruption and the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, and references to the jurisprudence of regional human rights courts and United Nations treaty bodies later joined this original listing. The Special Rapporteur will continue referring to and applying these standards in his work and will advocate for their dissemination and full implementation. In this context, it will be essential to recall that the requirements of independent and impartial justice are universal and that the general practice of providing independent and impartial justice constitutes an international custom in the sense of article 38 (1) (b) of the Statute of the International Court of Justice (see E/CN.4/1995/39, paras. 32 and 35).

2. Role of the Special Rapporteur and methods of work

11. The work of the Special Rapporteur on the independence of judges and lawyers is rich and complex as the scope of the mandate is rather extensive, encompassing issues such as access to justice, the independence and impartiality of the judiciary and the proper functioning of the justice system, the protection of individual judges, lawyers, prosecutors and court officials, and the right to a fair trial and due process of law.

12. To discharge his duties, the Special Rapporteur will follow the working methods established by his predecessors as well as by the special procedures of the Human Rights Council, and he intends to contribute to future discussions on how to improve these methods of work, including through participation in the annual meeting of special procedure mandate holders.

13. The Special Rapporteur wishes to underline that cooperation is essential for the discharge of the mandate, whether it be to carry out country visits, prepare thematic reports or gather information on cases or situations of concern. For this reason, he intends to establish and maintain direct contact with Member States, United Nations agencies and bodies, other special procedure mandate holders, professional associations of judges, lawyers and prosecutors, national human rights institutions, civil society organizations, academia and other relevant stakeholders throughout his tenure. The Special Rapporteur is convinced of the need to strengthen multilateral cooperation and coordination to address problems concerning the independence of judges and lawyers.

3. Rule of law, separation of powers and the independence of judges and lawyers

14. Judicial independence is fundamental for the protection of human rights, democracy and the rule of law. In 1985, the General Assembly endorsed the Basic Principles on the Independence of the Judiciary. That independence, as stated by the Basic Principles, shall be guaranteed by the State and enshrined in the Constitution or the law of the country.

15. The Human Rights Council and its predecessor, the Commission on Human Rights, have highlighted in numerous resolutions the importance of an independent and impartial judicial system to uphold the rule of law, democracy and human rights.[2] Rule of law must be understood by virtue of the fact that, in democratic societies, people are equal under the law and no one can be above it.

16. The Special Rapporteur is convinced that respecting the rule of law and fostering the separation of powers and the independence of justice are prerequisites for the protection of human rights and democracy. However, independence of the judiciary cannot provide carte blanche to judges. They must act in accordance with the principles set out by the rule of law, democracy and the separation of powers.

17. Regarding the independence of lawyers, the Special Rapporteur fully endorses and supports the Basic Principles on the Role of Lawyers, which represent the most comprehensive international normative framework aimed at safeguarding the right of access to legal assistance and the independent functioning of the legal profession (see A/71/348, para. 22). They provide that all persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them at all stages of criminal proceedings. They also list the measures that Member States should adopt to ensure access to lawyers and legal services and establish several safeguards for the professional functions of lawyers and their security.

4. Towards an agenda for implementation

18. Several decades after the creation of the mandate, the entry into force of the International Covenant on Civil and Political Rights and the adoption of the Basic Principles on the Independence of the Judiciary, the Basic Principles on the Role of Lawyers and the Guidelines on the Role of Prosecutors, the most fundamental human rights related to the independence and impartiality of the justice system are still blatantly violated on a daily basis around the world.

19. The Special Rapporteur wishes to call on Member States and the international community to renew their efforts to disseminate the content of these instruments and other international standards relating to the independence of judges, lawyers and prosecutors, and to adopt urgent measures aiming at their full implementation. These measures shall include the swift transposition of international law into domestic law for States functioning under a strictly dualist system. They shall also include awareness-raising and training of judges, lawyers and prosecutors on the content and application of international norms at the domestic level for States functioning under a monist system. Awareness-raising and training on the jurisprudence of regional courts on the subject, when applicable, should also be undertaken.

20. As underlined in the Vienna Declaration and Programme of Action, the administration of justice, including law enforcement and prosecutorial agencies and especially, an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments, are essential to the full and non-discriminatory realization of human rights and indispensable to the processes of democracy and sustainable development.

21. A positive example of the incorporation of international norms and standards can be seen in the Inter-American human rights system. The incorporation of the jurisprudence of the Inter-American Court of Human Rights by constitutional and supreme courts in Latin America is consolidating important democratic standards for the action in the national

[2] See, for instance, Council resolutions 29/6 and 31/2.

courts, including the rights to judicial protection and fair trial, due process and independence of the judiciary.

22. The Special Rapporteur will come back to the issue of setting up a clear agenda for the effective implementation of international instruments related to the independence of the justice system, including via the application of international law and jurisprudence in domestic courts, in future report.

B. Overview of the thematic work accomplished since the establishment of the mandate

23. The issues and situations addressed by the successive mandate holders were complex and often interrelated, each with its own importance if the justice system is to fulfil its role in the protection of human rights in an independent, impartial and fair manner. In the section below, the Special Rapporteur provides a review of this wealth of work, with a view to taking stock of achievements and identifying questions, problems and challenges which should frame his work, and on which he intends to focus his efforts.

1. Judicial independence

24. Article 10 of the Universal Declaration of Human Rights protects judicial independence. This is an obligation to be guaranteed and not a privilege that States may grant. The Basic Principles on the Independence of the Judiciary deal with the following subjects: (a) independence of the judiciary; (b) freedom of expression and association; (c) qualifications, selection and training; (d) conditions of service and tenure; (e) professional secrecy and immunity; and (f) discipline, suspension and removal.

25. The United Nations system has highlighted the importance of integrity and independence of the justice sector in many resolutions,[3] as well as of the fight against corruption. Building on these efforts, in 1997 the Special Rapporteur noted that attacks on the independence of judges and lawyers were not confined to developing countries. Therefore, he underscored the universality of the threat to the independence of judges and lawyers and the need for constant international vigilance (see E/CN.4/1997/32, para. 190).

26. In 2004, after having reviewed the work of his predecessor, the Special Rapporteur noted that the independence of judges and lawyers was at risk throughout the world, although to varying degrees and for reasons or in forms that are sometimes quite different (E/CN.4/2004/60, p. 11).

Requirements and conditions of judicial independence

27. In his first report to the Commission on Human Rights, the Special Rapporteur noted that, with regard to some issues, reiteration might be necessary in relation to the principle of the separation of powers, which is the bedrock upon which the requirements of judicial independence and impartiality are founded (see E/CN.4/1995/39, para. 55).

28. The mandate of the Special Rapporteur is not limited to defending individuals engaged in a judicial activity, but includes looking into the individual attributes and institutional conditions necessary to an independent and impartial justice for the benefit of the consumers of justice rather than a privilege of the judiciary for its own sake (see E/CN.4/2004/60, para. 27).

29. The Special Rapporteur has reiterated the misconception or misunderstanding often prevailing around the function of judicial review, or its equivalent, of the constitutionality or legality of executive decisions, administrative orders and legislative acts. The process of judicial review serves to check executive and legislative excesses by upholding the rule of law, noting that in principle this is not a matter of substitution of functions (see E/CN.4/1995/39, para. 56).

[3] See, for instance, paragraph 15 of resolution 5/4 and paragraph 5 of resolution 6/6 of the Conference of the States Parties to the United Nations Convention against Corruption.

30. It has been established that the desire to restrict or even suspend judicial review (or its equivalent) of the constitutionality or legality of executive decisions and administrative acts and laws would be tantamount to impairing the independence of justice (see E/CN.4/2004/60, para. 29).

31. In a 2016 report, the Special Rapporteur underscored that legislative activity lacks effectiveness if there is no commitment to respect and enforce it. Moreover, whenever Governments, political and economic actors, judges, lawyers and prosecutors do not behave according to the specific roles they have to play in a democratic society, the prerequisites of independence become difficult to fulfil (see A/HRC/32/34, para. 39).

Institutional safeguards

32. In a comprehensive report submitted in 2009 (A/HRC/11/41), the Special Rapporteur highlighted the features having an impact on the independence of the judiciary as an institution: the separation of the judicial function from other branches of power as prerequisite; the guarantee of independence at the constitutional level; the selection and appointment process; the prohibition of ex post facto tribunals; judicial budget; freedom of association and expression; the assignment of court cases; independence within the judiciary and investigations into allegations of improper interference.

33. The Special Rapporteur established early on that the independence and impartiality of the judiciary can be effectively secured if there is in the State a well-entrenched independent mechanism responsible for the appointment, promotion, transfer and dismissal of judges (see E/CN.4/1995/39, para. 65).

34. The Special Rapporteur has also underlined that it is important for the judiciary to have a sufficient operating budget and financial autonomy vis-à-vis the executive and legislative powers, and that budgetary independence had to be accompanied by an effective external audit (see E/CN.4/1996/37, para. 32).

Individual conditions

35. In a 2009 report, the Special Rapporteur also identified important parameters to effectively guarantee the individual independence of judges: tenure and irremovability; immunity; promotion and conditions of service, including judicial salary; human and material resources and security and training. The Special Rapporteur had also noted earlier that, in addition to the traditional safeguards necessary to secure judicial independence, the character, qualifications and independence of the individual appointee make an important difference (see E/CN.4/1996/37, para. 92).

36. In several thematic reports, concerns were expressed regarding the problem of judges appointed on a provisional basis without security of tenure. As was noted, such appointments could become a serious threat to the independence of the judiciary, as provisional or temporary judges are vulnerable to executive interference and even tensions within the judiciary (see E/CN.4/1998/39, para. 183).

Justice and the judiciary in a period of transition

37. From the beginning of the mandate, the Special Rapporteur has paid special attention to countries undergoing transition to democracy, since their needs were generally considerable and positive steps early in their transition would contribute significantly to achievement of the rule of law, respect for human rights and peace and prosperity (see E/CN.4/1995/39, para. 12). Special mention was made, in particular, of the understanding and respect for the principle of separation of powers as a sine qua non ingredient for democratic States and which is, therefore, of cardinal importance for countries in transition to democracy (ibid., para. 55).

38. In previous reports the Special Rapporteur has expressed concern about the problems faced by countries in transition in providing an independent and impartial justice system, in particular the lack of financial resources, the lack of human resources and of infrastructure (E/CN.4/1998/39, para. 184).

39. In transition processes, whether post-conflict or post-authoritarian, it is normal to hold to account judges involved in human rights violations and corruption who wish to retain their posts. Even in such cases, the Special Rapporteur properly underscored that international standards for a fair trial and the Basic Principles on the Independence of the Judiciary must be strictly observed in all circumstances (see E/CN.4/1996/37, para. 41).

40. Noting the dilemmas authorities may face during periods of transition, especially with regard to the prosecution of human rights violations, crimes and abuses committed by members of a regime that may have appointed them, the Special Rapporteur stated that one priority of a country in transition to peace or democracy may be to "clean up" its judiciary in order to restore its legitimacy, independence and impartiality, and ultimately its public credibility (see E/CN.4/2005/60, para. 44). To avoid arbitrariness, abuse and the settlement of scores, he underlined that the dismissal of judges or their reappointment through a new selection process must fully respect international standards for a fair trial and the Basic Principles on the Independence of the Judiciary (ibid., para. 45).

2. Judicial ethics, corruption within the judiciary and judicial accountability

41. In previous reports, the Special Rapporteur has noted that threats to judicial independence came not only from the executive or legislative branches, but also from organized crime, businesses, corporate giants and multinationals (see E/CN.4/1996/37, para. 246). The present mandate holder takes particular note of how organized crime and corruption are increasingly affecting the capacity of many States and the judiciary to fulfil their duties. How these manifest and recommendations to address this growing phenomenon will be an issue of special concern in forthcoming reports.

Judicial integrity and accountability

42. The formulation of judicial codes of ethics and the establishment of judicial complaints mechanisms composed only of sitting and/or retired judges has been mentioned as a process to be promoted (see E/CN.4/2002/72, para. 37). The Bangalore Principles of Judicial Conduct were annexed to the annual report of the Special Rapporteur in 2003 (E/CN.4/2003/65) to stress this approach. The issues of judicial integrity and judicial accountability were also addressed by the Special Rapporteur in two reports (A/67/305 and A/HRC/26/32). In the latter, she noted that judicial accountability must never be used to arbitrarily undermine the independence of judges and, for that reason, any accountability mechanisms must follow procedures that are in line with international standards of due process of law and fair trial.

Judicial corruption

43. In the past, the Special Rapporteur drew attention to the growing concerns about judicial corruption (see E/CN.4/2000/61 and Corr.1, para. 29). He noted a need to devote greater attention to promoting judicial integrity and accountability, which would strengthen judicial independence and public confidence in the judiciary (see E/CN.4/2001/65, para. 28). He also noted that judicial accountability had become an issue of importance in several countries, leading to tensions between Government and the judiciary.

44. Early in the mandate, the Special Rapporteur explained that corruption within the judiciary went far beyond economic corruption in the form of embezzlement of funds allocated to the judiciary or bribes. It could, for instance, take the form of biased participation in trials and judgments as a result of the politicization of the judiciary, the party loyalties of judges or all types of judicial patronage. An important issue of concern for the Special Rapporteur relates to the pressure and direct action carried out by organized crime against the judiciary to influence the decisions of judges, lawyers and prosecutors. A lack of trust in the judiciary is lethal for democracy and development and encourages the perpetuation of corruption (see E/CN.4/1996/37, paras. 39-40).

45. In a full report devoted to the issue of judicial corruption (A/67/305), the Special Rapporteur looked into the specific parameters necessary to safeguard judges from conditions conducive to corruption and strengthen their capacity to counter and combat all manifestations of judicial corruption. She also noted that a judiciary whose independence is

not firmly institutionalized and adequately protected can easily be corrupted or co-opted by interests other than those of applying the law in a fair and impartial manner.

3. Independence of lawyers and the legal profession

46. In the first report, the Special Rapporteur stated that he would be vigilant with regard to the protection of the important role of lawyers and their respective bar associations in upholding human rights and fundamental freedoms. In this context, he made an important distinction between engagement in the protection of human rights which have political connotations, and engagement in politics per se (see E/CN.4/1995/39, para. 72).

47. The Special Rapporteur acknowledges the importance of the standards set out in the Basic Principles on the Role of Lawyers and the Guidelines on the Role of Prosecutors. He will give special attention to this matter, and takes the opportunity to call on all bar associations and lawyers' organizations to adopt the same course of action. The Special Rapporteur wishes to express his support for and endorsement of all the actions that can be implemented to this end.

Safeguards for the protection of lawyers

48. As far back as 1998, the Special Rapporteur had already noted a constant concern that had been expressed about the increased number of complaints concerning Governments' identification of lawyers with their clients or their clients' causes, especially lawyers representing the accused in politically sensitive cases. Identifying lawyers with their clients' causes could be construed in many circumstances as intimidation and harassment, against which Governments have an obligation to protect lawyers (see E/CN.4/1998/39, para. 179).

49. The Special Rapporteur later declared that he would also pay particular attention to any attempt to suppress or restrict the independent operation of bar associations, as had been expressed in previous reports (see E/CN.4/2004/60, para. 46).

50. Previous mandate holders identified prerequisites and safeguards that are essential for lawyers to freely and effectively discharge their professional functions (A/64/181); looked in detail into the provision of legal aid (A/HRC/23/43 and Corr.1); and addressed again the importance of protecting the independence of lawyers and the legal profession (A/71/348). Besides looking into the fundamental role of lawyers in providing access to justice and the right to have access to a lawyer, the Special Rapporteur also looked into the necessary safeguards for the professional functions of lawyers and their security and important aspects of the organization of the legal profession.

4. Special circumstances giving rise to violations of the independence of judges and lawyers and the proper administration of justice

Reasons of State and the protection of national security

51. In the first report, the Special Rapporteur declared that restrictions to judicial independence based on "reasons of State", including national security, should be carefully scrutinized and clear limits established. He noted the importance of avoiding the excessive usage of the prerogatives conferred on governmental authorities (see E/CN.4/1995/39, para. 58). A subsequent mandate holder noted that he would continue paying attention to States where laws allowed the executive to order the detention of persons suspected of conspiring or intending to conspire against national security and to keep them detained without charge or trial, sometimes in secret and even without access to any judicial remedy or to counsel (see E/CN.4/2004/60, para. 55).

Counter-terrorism

52. Several reports and jurisprudence from international human rights bodies have underlined the problems that certain anti-terrorism measures may present for judicial independence and the independence of the legal profession. The use of "faceless" judges, secret witnesses and limitations on the presentation and use of evidence are examples of measures that affect the independence of the judiciary, restrict the defendant's right of due

process and violate the right to a fair trial in a systematic way (see E/CN.4/1996/37, paras. 66-77).

53. In 1998, the Special Rapporteur noted an increase in complaints of Governments' non-compliance with internationally accepted standards of due process particularly in terrorist-related crimes, raising questions concerning the integrity, independence and impartiality of the courts (see E/CN.4/1998/39, para. 182). Following the terrorist attacks in the United States on 11 September 2001, the Special Rapporteur announced that he would give careful attention to the effects any measures taken by Governments might have on the respect for the rule of law and the proper administration of justice (see E/CN.4/2002/72, para. 28).

54. The Special Rapporteur later indicated that complaints concerning the failure of Governments to respect internationally accepted judicial guarantees in terrorism-related crimes were constantly increasing. Concerns about the repercussions of counter-terrorism measures on respect for legality were also increasing (see E/CN.4/2004/60, para. 58).

States of emergency

55. In several reports, the Special Rapporteur expressed concerns in relation to judicial independence in states of emergency, noting that decrees instituting states of emergency were often followed by mass dismissals of judges, the creation of special courts and the restriction or suspension of the judicial review function (see E/CN.4/1995/39, para. 59).

56. Even during a state of emergency, the rule of law must be respected. The Special Rapporteur said, in particular, that there should be no prolonged detentions without trial, that all detainees should have access to a legal representative and should have the right to have the lawfulness of their detention reviewed by an independent court (see E/CN.4/2002/72, para. 28; see also A/HRC/4/25).

Military justice and special courts

57. As early as the first report, the Special Rapporteur expressed concerns regarding military courts, revolutionary courts or similar special courts, noting that the criterion of independence was not always assured (see E/CN.4/1995/39, para. 57).

58. The setting up of parallel courts to deal with terrorist-related offences has been mentioned as a matter of concern (see E/CN.4/2003/65, para. 39), since in several circumstances these courts' composition and procedures are often far from complying with the requirements of article 14 of the International Covenant on Civil and Political Rights (see E/CN.4/2004/60, para. 54).

59. The successive mandate holders have focused considerable attention on the question of the military justice system and the establishment of special courts, in particular for the trial of terrorism-related cases, in their reports to the Commission on Human Rights and the Human Rights Council (E/CN.4/2004/60, E/CN.4/2005/60, A/HRC/8/4, A/HRC/11/41 and A/HRC/20/19) and the General Assembly (A/61/384, A/62/207, A/63/271, A/68/285 and A/70/263).

5. Equality before the courts

60. An essential component of the right to access to justice, the right to equality before the courts has been largely addressed by the Special Rapporteur (see, for instance, A/HRC/8/4, para. 20, A/66/289 and A/70/263, paras. 74-84). Fulfilling this provision requires States not only to prohibit de jure or de facto distinction in accessing courts and tribunals that are not based on law and cannot be justified on objective and reasonable grounds, but also to take positive measures to ensure that no human being is deprived of his or her right to claim justice.

Women in the justice system

61. The Special Rapporteur has consistently paid particular attention to the relationship between gender and the judiciary, underscoring the problems that women have to face in some countries to enter the judiciary; pointing out the difficulties that arise in some places

when women want to exercise their rights before the courts; stating that impunity for certain kinds of crime, particularly sex-related crimes, is a source of obvious discrimination and an obstruction with regard to the exercise of the right of access to justice (see A/HRC/8/4, para. 51); and identifying the need to implement and coordinate within the State a range of processes, mechanisms, laws and policies in order to achieve a gender-sensitive judiciary.

62. In 2011, the Special Rapporteur identified the conditions under which a gender-sensitive judiciary could be developed and how the judiciary could foster women's human rights (A/HRC/17/30 and Corr.1). She further addressed the necessity for setting up rules of procedure and guarantees that are gender-sensitive in order to ensure the equality of women before the courts, and noted that women must benefit from the right to a fair trial and equality before the courts without discrimination based on their gender (A/66/289).

63. The system of administration of justice has a crucial role to play in relation to the effective protection of women's human rights, the empowerment and development of women and the advancement of gender equality (see A/HRC/17/30 and Corr.1, para. 82).

Children in the justice system

64. In 2004, the Special Rapporteur noted that special attention had to be paid to the administration of justice in the case of children, in particular children in conflict with the law, noting that minors should enjoy at least the same guarantees and protection as adults pursuant to article 14 of the International Covenant on Civil and Political Rights (see E/CN.4/2004/60, para. 51).

65. In 2015, the Special Rapporteur devoted a full report to the issue of children in the justice system (A/HRC/29/26 and Corr.1). She looked at the protection of children's rights in the justice system and analysed the essential role that must be played by judges, prosecutors and lawyers in upholding children's human rights and applying international human rights norms, standards and principles at the domestic level. She concluded that investing in child-sensitive justice is indispensable to strengthening the rule of law and the enjoyment of human rights by all, as well as to building flourishing democratic societies (ibid., para. 2).

66. The Special Rapporteur further underlined that in all decisions relating to children, including in the context of the administration of justice, the best interest of the child must be paramount. This statement not only implies that children have special rights, but also that their needs and interests must be given primary consideration in all the aspects of the justice system.

6. Access to justice and legal aid

67. The Special Rapporteur has dedicated extensive work to the issue of access to justice and, more particularly, legal aid (see, for instance, A/62/207, A/HRC/8/4, A/HRC/14/26, A/HRC/17/30 and Corr.1, A/69/294 and A/HRC/29/26 and Corr.1). In 2014, the Special Rapporteur demonstrated the need to integrate the concept of the rule of law, including access to justice, into the post-2015 development agenda (A/69/294). She noted that access to justice is a legally complex issue because it constitutes both the means for realizing and restoring rights, but is also a fundamental human right in itself. On the issue of legal aid more particularly, the Special Rapporteur strongly advocated for legal aid to be available to all individuals engaged with the justice system as its aim is to contribute to the elimination of obstacles that impair equal access to justice (A/HRC/23/43).

7. Education, training and capacity-building of judges, lawyers and prosecutors

68. The need for high-quality education and continuing training of judges, prosecutors and lawyers was highlighted in a series of reports over the years (see, for instance, A/HRC/11/41, A/HRC/14/26, A/65/274, A/66/289, A/HRC/20/19, A/HRC/20/20, A/HRC/29/26 and Corr.1 and A/71/348). Proper administration of justice requires judges, lawyers and prosecutors to have a solid legal training, including on-the-job training that takes account of the most recent developments in law and national jurisprudence and covers, inter alia, international human rights standards and principles, international

humanitarian law and international law on refugees, international criminal law and the principles of national and international professional ethics.

C. Specific issues of concern

69. The current mandate holder has identified four broad areas of concern related to his mandate: judicial independence; corruption, organized crime and the independence of judges and lawyers; protection of the legal profession; and restrictions to the right to a fair trial and due process of law.

1. Guaranteeing judicial independence

Interference in, pressures on and threats against the judiciary

70. The independence of the judiciary is linked to the lack of interference in, pressures on and threats against the judiciary. To ensure the independence of the judicial system, judges, lawyers and prosecutors must be free of any interference, pressure or threat that might affect the impartiality of their judgments and decisions. Otherwise, the independence of the judicial system would be seriously jeopardized, as its practitioners would not be able to fulfil their tasks in an objective and independent manner.

71. Principles 2 and 4 of the Basic Principles on the Independence of the Judiciary mention the requirement of non-interference in order to guarantee the independence of the judiciary. Such lack of interference implies that no authority, private group or individual may interfere in judicial decisions; they must respect and abide by the decisions of the judiciary. Judges shall decide matters presented before them not only impartially and in accordance with the law, but without threats or interference. The decision-making process can be assured only if there is no inappropriate or unwarranted interference with the judicial process.

72. The Special Rapporteur would like to stress the importance of protecting the judiciary and the legal professions from interference and pressures in order to protect human rights. As stated by Louis Joinet in 1993, fundamental freedoms are all the better safeguarded to the extent that the judiciary and the legal professions are protected from interference and pressure (see E/CN.4/Sub.2/1993/25, para. 1).

Role of the media

73. Freedom of the press constitutes an essential element of freedom of expression, and is enshrined in many international instruments and national constitutions. A free and independent press fosters a better-informed society with the capacity to constructively question government authority, thereby preventing abuses of power. According to the Madrid Principles on the Relationship between the Media and Judicial Independence, both the media and the judiciary have a shared responsibility to guarantee freedom of the media and independence of the judiciary. The judicial system, for its part, has to guarantee the existence of a free and independent media. On the other hand, the media have an obligation to respect the rights of individuals, protected by the International Covenant on Civil and Political Rights, and the independence of the judiciary.

74. From the outset, the Special Rapporteur has relayed increasing concerns about the complex relationships between the media and the judiciary. For instance, the Special Rapporteur worried about the critical issue of how extensive media coverage could affect a fair and impartial trial, an issue that may be even more relevant with the advent of the Internet and social media. He stressed that a fine balance had to be struck between the right of the "consumers" of justice to a fair and impartial trial and the equally important right to freedom of expression and the corresponding right to information (see E/CN.4/1996/37, [illegible]).

2. Corruption, judicial accountability and the independence the justice system

75. The Special Rapporteur wishes to highlight how corruption affects the respect for and the protection of human rights, and calls on States to prioritize this issue. Being free from official corruption must be "a fundamental obligation that governments owe to every individual by virtue of being human, that trumps other policy considerations, and the violation of which is a grave affront to justice".[4] Thus, corruption should not only be understood as affecting human rights, but also as a human rights violation in itself. The impact of corruption on the realization of human rights depends not only on the forms and severity of corruption, but also on its pervasiveness. Corruption is an obstacle to the realization of human rights in general and in specific cases it can also constitute a direct violation of specific human rights.

76. On the one hand, the existence of corruption in the judiciary directly undermines the rule of law and the ability of the judiciary to guarantee the protection of human rights. On the other, corruption can represent a very serious threat for judges, prosecutors, lawyers and other actors fighting against it and directly or indirectly impede the proper discharge of their professional functions. Systematic corruption enjoys impunity when institutions are unable to perform their functions. As mentioned by the Special Rapporteur, to effectively combat corruption support for the independence of the judicial system is crucial, as is the need for institutional and efficient security for all actors in the justice system, especially when dealing with cases of so-called grand corruption (see A/67/305, para. 4).

77. The Special Rapporteur will continue to pay special attention to the various manifestations of judicial corruption and the measures needed to fight it in line with international standards on judicial independence, as well as to the very serious challenges and threats faced by judges, lawyers, prosecutors and other legal professionals when confronting and combating corruption, and the safeguards that must be enforced to ensure their security and that they can carry out their duties independently.

78. The 2030 Agenda for Sustainable Development refers to the need to have institutions at all levels of State that can be held accountable. Furthermore, to assure the independence of judges and lawyers, it is not enough to have institutions that can be held accountable; it is also important that they appear to be accountable in the eyes of the society as a whole. As stated by Giuseppe Di Federico, "the role of judges is inextricably tied to a set of characteristics and values that are essential for the very legitimacy of the judicial function … as judges are expected to behave with honesty and propriety".[5]

79. Accountability is a concept inherent in the rule of law, which is at the heart of the principles promoted by the United Nations. The importance of accountability is also highlighted in article 1 (c) of the United Nations Convention against Corruption as a means to fight corruption. Within the judiciary, it implies the acceptance of responsibility by judges, prosecutors and lawyers for the failure to act according to the standards and principles that must be observed during the performance of their duties.

80. In a 2014 report (A/HRC/26/32), the Special Rapporteur set out a number of basic requirements for judicial accountability mechanisms to be put into practice:

- The relationship between the justice operator to be held accountable and the forum, body or institution to which he or she must respond needs to be clearly defined.
- The justice operator to be held accountable must have the means to properly explain and justify any conduct or action deemed inadequate, inappropriate or illegal through due process.
- The forum, body or institution exercising judicial accountability must be entitled to pose questions and assess whether the justice operator should face sanctions or not.

[4] Matthew Murray and Andrew Spalding, "Freedom from official corruption as a human right", in Governance Studies at *Brookings*, January 2015.

[5] "Judicial accountability and conduct: an overview", in Anja Seibert-Fohr, ed., *Judicial Independence in Transition*, 2012.

United Nations Convention against Corruption

81. The United Nations Convention against Corruption represents a major milestone in the fight against corruption. It introduces a comprehensive set of standards, measures and rules to strengthen the legal and regulatory regimes to fight corruption. Furthermore, it calls for preventive measures and the criminalization of the most prevalent forms of corruption in both the public and private sectors.

82. The preamble to the Convention underscores how corruption affects societies and countries across boundaries, calling on States to adopt measures to prevent and address the impact of organized crime. The Convention underlines the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law, warning about the links between corruption and other forms of crime, in particular organized crime and economic crime, including money-laundering. It concludes that corruption is no longer a local matter but a transnational phenomenon that affects all societies and economies, making international cooperation to prevent and control it essential.

83. Article 11 of the Convention emphasizes the crucial role of the judiciary in combating corruption and recognizes that, to play this role effectively, the judiciary itself must be free of corruption and its members must act with integrity. The Special Rapporteur will use the Convention as a guiding instrument throughout his future reporting on the topic, particularly with regard to the following issues: (a) the strengthening of the judiciary to prevent corruption opportunities; (b) the prosecution of bribery of public officials; (c) the removal of legal obstacles that constitute an obstruction of justice; (d) the adoption of norms to protect witnesses, experts and victims; (e) cooperation at the national and international levels; and (f) implementation of mutual legal assistance.

84. The judicial system must implement measures to defend itself against corruption while, at the same time, it has to fight decisively against this scourge at all levels in a holistic manner. That is one of the several reasons why the link between corruption, human rights and the actors within the justice system must be approached from a dual perspective. On the one hand, the direct threats that judges and lawyers are facing must be confronted. On the other hand, the challenges that corruption can pose must be analysed to strengthen capacities and determine how to combat corruption and organized crime effectively and more efficiently.

85. It is crucial that Member States, human rights organizations and other relevant stakeholders incorporate the principles enunciated in the Convention in their programmes and strategies and work towards the implementation of the Convention's obligations. In addition, entities of the United Nations system should work in closer cooperation to follow up on the implementation of the Convention. For instance, in 2016, the United Nations Office on Drugs and Crime launched a global programme on promoting a culture of lawfulness, which includes the establishment of a global judicial integrity network to exchange best practices and lessons learned on priority challenges and emerging issues with regard to judicial integrity and the prevention of corruption. The Special Rapporteur takes note of this initiative and looks forward to collaborating in the full implementation of this programme.

3. Protecting the legal profession

86. We must not, and cannot, lose sight of the fact that lawyers can face specific hazards as result of interference, pressures and threats, which may include physical, psychological and social abuses directed against them and their relatives. The Basic Principles on the Role of Lawyers are an essential instrument that must be implemented, respected and disseminated to guarantee the rights of the legal profession.

Lawyers at risk

87. In democratic systems, lawyers have a seminal role to play in ensuring that all citizens have adequate access to justice and reparations. The important and specific role of

lawyers in ensuring the efficient functioning of democracy and the enjoyment of human rights must be kept in mind.

88. However, lawyers can perform their professional functions without interference and impediments only if their independence is safeguarded. As expressed in the Basic Principles, States have a key role to play as guarantors of their independence and security.

89. Of particular importance is the duty of States to ensure the right to a fair trial and the respect for the presumption of innocence. The role of lawyers is crucial to assure this pillar of democracy, and States should foster an enabling environment to ensure that they can carry out their work impartially, objectively and professionally, without any external pressure or identification with their client's behaviour, activities or opinions. The Special Rapporteur takes note of the existing barriers and threats faced by lawyers around the world and will analyse this issue in future reports.

Role of bar associations

90. According to principle 23 of the Basic Principles on the Role of Lawyers, as citizens, lawyers are entitled to freedom of expression, belief, association and assembly. Moreover, principle 24 expressly establishes that lawyers are entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity.

91. Taking the Basic Principles as reference, bar associations should assume the functions of upholding professional standards and ethics, protecting their members, providing legal services and cooperating with governmental and other institutions in furthering the ends of justice and the public interest.

92. The Basic Principles also refer to the independence of the legal profession and disciplinary proceedings (see in particular principles 26-29) as basic elements of the role of lawyers. Bar associations and lawyers' organizations provide the perfect platform for ensuring and defending the independence of lawyers and addressing allegations of interference through the collective action of its members. They are also responsible for ensuring that the work conducted under their umbrella is performed in accordance with the professional and ethical standards established by the bar associations. Principle 23 of the Basic Principles stipulate that lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession.

93. Professional organizations and/or bar associations are the institutions responsible for protecting professional integrity and enforcing disciplinary measures. Such proceedings should be transparent, impartial, fair and objective. As the Special Rapporteur has stated, such an organization would not only provide a mechanism of protection for its members against undue interference in their legal work, but also monitor and report on their members' conduct, ensuring their accountability and applying disciplinary measures in a fair and consistent manner (see A/HRC/23/43/Add.1, para. 87).

4. Restrictions to the right to a fair trial and due process of law before an independent, impartial and competent tribunal

Role of judges and lawyers with regard to pretrial detention and arbitrary detentions

94. It is the task of an independent judiciary to guarantee the enjoyment of the right not to be arbitrarily deprived of one's liberty. International human rights law establishes strict limits on the power of States to deprive human beings of personal liberty. The International Covenant on Civil and Political Rights establishes the prohibition of arbitrary arrest and detention. In a State that abides by human rights standards the infringement of these tenets can involve criminal and civil proceedings.

95. According to article 9 (3) of the International Covenant, anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him and, if detained on a criminal charge, the detainee shall be brought promptly before a judge or other officer authorized by law to exercise judicial power.

96. The main role of judges when facing such situations is to permit the detainee to challenge the legality of the arrest and detention before a court of law. Judges must not only decide about the lawfulness of the detention; they have also to ensure that the person's fundamental rights have been respected.

Right of access to a lawyer

97. Any detainee or accused person has the right to have access to a lawyer without undue delay. It is the obligation of States to set out the necessary mechanisms to ensure that persons deprived of their liberty can effectively exercise their defence rights, including the access to a lawyer.

98. The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems stipulate that legal aid is an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law.

99. Such a right is paramount in a State based on the rule of law. It guarantees the possibility for the detainee to rebut the evidence presented against him or her and act in the most favourable way for his or her interest.

Military courts and the right to a fair trial

100. Military courts tend to be structured within a hierarchical system of command and control. This creates a difficulty in conducting a fair and impartial trial. Military procedures carried out or influenced by corrupt officers create a general distrust in military courts on the part of civilian populations, as stated by Arne Willy Dahl at an expert consultation organized by the Office of the United Nations High Commissioner for Human Rights in 2014 (A/HRC/28/32). Such situations of bias and corruption result in a violation of article 14 of the International Covenant, which stipulates that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

101. The Special Rapporteur calls on States to adopt specific norms that expressly exclude civilians from investigation and prosecution by military tribunals, ensure that their jurisdiction is limited to military offences committed by active members of the military and protect the rights to fair trial and due process.

Role of the justice sector in states of emergency

102. States are responsible for providing effective domestic remedies before independent and impartial courts or authorities. Non-derogable rights must be protected in states of emergency, and under no measures of derogation should the efficacy of these remedies be allowed. As clarified by the Human Rights Committee in its general comment No. 29 (2001) on derogations from provisions of the Covenant during a state of emergency, even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective.

103. According to article 14 (1) of the International Covenant, in the determination of any criminal charge against them, or of their rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. As indicated by the Human Rights Committee in its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, derogating from normal procedures required under article 14 in circumstances of a public emergency should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation. The guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights. Deviating from fundamental principles of fair trial, including the presumption of innocence, is prohibited at all times.

Role of the justice sector in conflict situations

104. In its resolution 9/10, the Human Rights Council outlined the need to promote the rule of law and to implement transitional justice mechanisms in conflict and post-conflict societies. The Justice and Security Programme of the United Nations Development Programme in Liberia has emphasized that these goals can be achieved by strengthening the judiciary as well as by empowering and developing the capacities of judges, lawyers and prosecutors to hold perpetrators to account, establish justice and combat impunity.

105. Judicial independence in conflict situations allows for a stronger separation between the judiciary and the State and ensures that trial proceedings are conducted in a fair and impartial manner. An independent judiciary will be better positioned to produce legal frameworks that adhere to and respect international human rights standards.

106. In a report to the Security Council, the Secretary-General highlighted the key issues and lessons affecting the promotion of justice in post-conflict societies. Prevention, legitimate structures for the peaceful settlement of disputes and the fair administration of justice are some of the key elements that should be taken into consideration when addressing this difficult situation. At this point, transitional justice, which aims at coping with the legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation, is essential to overcome the situations created by conflicts (see S/2004/616, para. 8).

Justice, reasons of State and protection of national security

107. The role of the justice sector in times of war — including when the central power is fighting local insurgencies — must take into consideration a basic set of rights that should be guaranteed, whatever the situation. It is for judges to interpret the law and safeguard the constitution without any improper influences or pressures. However, in armed conflicts the threat to judicial independence is heightened, with threats both internal and external.

108. The fundamental question is whether the role of the judiciary should change during armed conflicts, especially when national security interests are concerned. Courts may need to give State authorities special consideration during an armed conflict, when the State's interest in protecting the nation's security is highest. However, this does not change the core function of the judiciary. When balancing the interests of the Government against those of individuals, even if judges have to give greater weight to governmental interests that may be legitimate during times of war or severe internal strife, it is imperative for courts to control governmental power to guarantee the respect for the rule of law and the rights of citizens.

III. Conclusions and recommendations

109. **The present report establishes the main topics that the Special Rapporteur intends to address during the course of his tenure. He will pay special attention to issues of judicial independence, corruption and organized crime within the judiciary, the protection of the legal profession and the restrictions to the right to a fair trial and due process of law.**

A. Conclusions

1. Overview of the thematic work accomplished since the establishment of the mandate

110. **The approach of the successive mandate holders went much beyond analysing the judiciary from the standpoint of legislation; they looked into how the justice system actually functions, and strove to identify factors, whether social, economic or cultural, hindering genuine equal access to justice for all. The Special Rapporteur will follow this approach.**

2. Specific issues of concern

Guaranteeing judicial independence

111. The rule of law can be upheld only if there is an effective system of separation of powers, where the independence of the judiciary is effectively guaranteed. The Special Rapporteur underscores the need to strengthen norms that can allow for the judiciary to carry out its function independently.

112. Issues relating to the establishment and functioning of military courts lie at the core of the mandate of the Special Rapporteur on the independence of judges and lawyers.

113. The media can perform their work in an impartial manner only when certain conditions are met. Such an environment must be assured by the State through the guarantee of the freedom of expression and the respect of a free press. On the other hand, the media must be aware of their responsibility and ensure that the information delivered is accurate, professional, rigorous and respectful of the independence of the judiciary.

Corruption, organized crime and independence of judges and lawyers

114. It is essential that all Member States and relevant international and regional organizations and institutions include as a priority in their agenda the elaboration and implementation of measures to fight not only the consequences but also the underlying causes of corruption.

115. Corruption and organized crime are severely undermining the capacity of many States to promote systems of governance accountable to and compliant with human rights standards by diminishing the confidence of the citizens in the administration of justice.

116. One of the current challenges to investigating and sanctioning corruption around the world has to do with the proper functioning of the State apparatus. Institutions need to work adequately and in accordance with the rule of law and international standards so that they can guarantee their independence when it comes to preventing and punishing improper behaviour.

117. The Special Rapporteur would like to highlight the importance of international judicial cooperation in the fight against corruption by developing exchanges of good practice and pooling experiences. In this respect, the United Nations Convention against Corruption offers an appropriate legal framework for effective action and international cooperation. Indeed, one of the purposes of the Convention is to promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption (art. 1 (b)).

118. Interferences, pressures and threats constitute significant risks to the independence of judges, which make them particularly vulnerable to corruption.

Protecting the legal profession

119. Bar associations, institutions that have a vital role to play in upholding professional standards and ethics, must assume their responsibilities in this respect and embrace both the Basic Principles on the Independence of the Judiciary and the Basic Principles on the Role of Lawyers.

Restrictions to the right to a fair trial and due process of law before an independent, impartial and competent tribunal

120. Restrictions to the right to a fair trial and due process of law before an independent, impartial and competent tribunal cannot be understood from a single point of view. The Special Rapporteur acknowledges that these restrictions are part of a multiple set of behaviours that can put at risk the right to a fair trial. The

circumstances allowing the implementation of such restrictions must be exceptional and limited by law.

B. Recommendations

121. The Special Rapporteur encourages all Governments to cooperate with and assist him in the performance of his functions in accordance with Human Rights Council resolution 26/7.

122. States should ensure that the Special Rapporteur is able to perform his mandate within their jurisdiction. For that purpose, the Special Rapporteur requests that they not only facilitate his country visits, but also assist by providing information when requested and responding to communications within a reasonable period of time.

123. The Special Rapporteur believes that it is necessary to foster multilateral cooperation and coordination in order to correctly address the independence of judges and lawyers from a global perspective.

124. The Special Rapporteur wishes to highlight that he is available to assist States with the assessment of the implementation of international standards aimed at ensuring the independence of judges and lawyers.

125. The Special Rapporteur encourages civil society organizations, academia and other relevant stakeholders to submit information and to participate in relevant activities with a view to contributing to the fulfilment of his mandate.

126. The Special Rapporteur encourages other special rapporteurs and the United Nations, including its specialized agencies, to cooperate to the fullest extent possible with the expert in the fulfilment of his mandate.

127. The Special Rapporteur encourages all States, bar associations and lawyers' organizations to endorse the Basic Principles on the Role of Lawyers and to disseminate their content, so that they may be fully known by all authorities and members of the legal profession.

128. States should take all steps to ensure that international rules and standards aimed at dealing with the issues addressed in the present and subsequent reports are gradually integrated in domestic law and applied by domestic courts. For that purpose, it would be useful to set out the basis for an agenda to discuss the application of international law and jurisprudence in domestic courts.

129. In order to ensure respect for human rights, Governments must remove the obstacles that prevent the enjoyment of these rights. In this context, corruption and organized crime represent the biggest challenges to be taken into consideration.

130. Each State party to the United Nations Convention against Corruption should take measures to strengthen judicial integrity and to prevent opportunities for corruption among members of the judiciary.

131. It is the responsibility of States to ensure security and physical protection for all members of the legal profession in order to guarantee the independence of the judiciary. One of the priorities must be to set out a protocol that would allow detecting and dealing with such circumstances.

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Report of the Special Rapporteur on the independence of judges and lawyers on her mission to Sri Lanka

Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the report of the Special Rapporteur on the independence of judges and lawyers on her mission to Sri Lanka from 29 April to 7 May 2016, which she conducted jointly with the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

The Special Rapporteur expresses her appreciation to the Government for its willingness to undergo an independent and objective scrutiny of its human rights situation relating to the independence of judges, prosecutors, lawyers and legal officers.

The report, which presents the Special Rapporteur's observations and recommendations, should be read in conjunction with the report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka (A/HRC/34/54/Add.2).

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Report of the Special Rapporteur on the independence of judges and lawyers on her mission to Sri Lanka*

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* Circulated in the language of submission only.

I. Introduction

1. The Special Rapporteur on the independence of judges and lawyers, Mónica Pinto, visited Sri Lanka from 29 April to 7 May 2016, at the invitation of the Government, to assess the situation and remaining challenges concerning the independence of judges, prosecutors and lawyers and the proper administration of justice. The visit was conducted jointly with the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment, Juan E. Méndez (see A/HRC/34/54/Add.2).

2. In addition to visiting Colombo, the Special Rapporteur travelled to Anuradhapura, Jaffna and Kandy. She met with the Minister for Foreign Affairs, the Minister for Justice, the Minister for Law and Order and the Minister for Prison Reforms, Rehabilitation, Resettlement and Hindu Religious Affairs; the Governors of the Central, North Central and Northern Provinces; and representatives of the Judicial Service Commission, the Human Rights Commission, the Legal Aid Commission, the National Police Commission and the Judges' Institute. She also held meetings with the Chief Justice and judges from all tiers, the Attorney-General and State counsels, representatives of the Sri Lanka Bar Association, lawyers, academics, representatives of civil society and members of the diplomatic community.

3. The Special Rapporteur wishes to reiterate her gratitude to the authorities of Sri Lanka, in particular the Minister for Foreign Affairs, for their invitation, the efforts displayed to facilitate the organization of the meetings and their cooperation during the visit. She also warmly thanks the United Nations Resident Coordinator, the Senior Human Rights Adviser and the United Nations country office in Sri Lanka for their committed support in organizing the visit, as well as all those who took the time to share their expertise and opinions with her.

II. Recent political context

4. The presidential and parliamentary elections of January and August 2015 changed the political scenario in the country and brought an opening in the democratic space. That opening was welcomed by many stakeholders, including in the international community. The new Government presented a 100-day programme of constitutional reform and other measures that sought political transformation, including by engaging with the United Nations and its human rights mechanisms to address accountability for human rights violations. The programme culminated in April 2015 with the adoption of the nineteenth amendment to the Constitution, which decreased executive power.

5. One of the promising reforms brought about by the nineteenth amendment was the re-establishment of the Constitutional Council.[1] The Council is the body in charge of recommending to the President the appointment of the members of a number of independent commissions, including the Human Rights Commission, the Public Service Commission and the National Police Commission, and of approving the appointments by the President of a number of high-ranking officials, such as the Chief Justice and the judges of the Supreme Court, the President and the judges of the Court of Appeal, the members of the Judicial Service Commission, the Attorney-General and the Inspector-General of Police.[2]

6. In October 2015, the Government confirmed its engagement with the Human Rights Council by supporting the adoption of resolution 30/1, in paragraph 6 of which the Council, inter alia, noted the proposal of the Government of Sri Lanka to establish a judicial mechanism with a special counsel to investigate allegations of violations and abuses of human rights and violations of international humanitarian law and affirmed that a credible

[1] The Constitutional Council was first established by the seventeenth amendment to the Constitution in 2001 and then abolished by the eighteenth amendment, in 2010.

[2] See chapter VII.A of the Constitution.

justice process should include independent judicial and prosecutorial institutions led by individuals known for their integrity and impartiality. The Council also affirmed, in that regard, the importance of participation in a Sri Lankan judicial mechanism, including the special counsel's office, of Commonwealth and other foreign judges, defence lawyers and authorized prosecutors and investigators.

7. In March 2016, Parliament launched the process to start drafting a new Constitution. A Steering Committee and six subcommittees were created, including the Subcommittee on the Judiciary, which submitted its report to the Steering Committee on 19 November 2016. The report focuses on issues related to the independence of the judiciary, the structure of the courts, the jurisdiction of the courts, including in terms of judicial review, and the establishment of the Constitutional Court and its jurisdiction.[3]

III. Justice system

A. Constitutional provisions

8. The current Constitution of Sri Lanka was adopted by the National State Assembly in 1978 and has been amended 19 times. While its preamble assures the independence of the judiciary, it contains no provision that expressly spells out and guarantees the principle of the separation of powers or the importance of judicial independence in a democratic society abiding by the rule of law.

9. Chapter XV of the Constitution, entitled "The judiciary", establishes, inter alia, the general court structure, the procedures for the appointment and removal of the judges of the Supreme Court and the Court of Appeal, those judges' mandatory age of retirement and their salaries, and the procedures for the appointment, disciplining and removal of the judges of the High Court. Chapter XVI, entitled "The superior courts", sets out the respective composition, jurisdiction and powers of the Supreme Court and the Court of Appeal.

10. Chapter XV.A establishes the Judicial Service Commission, which is responsible for appointing, promoting, transferring and disciplining, including through dismissal, judicial officers (with the exclusion of judges of the superior courts and the High Court); transferring judges of the High Court; setting up rules concerning recruitment and training processes, the appointment, promotion and transfer of judicial officers and the training of judges of the High Court; and authorizing the inspection of any court of first instance. The Commission consists of the Chief Justice and the two most senior judges of the Supreme Court, all of whom are appointed by the President subject to the approval of the Constitutional Council.

11. Chapter VII.A establishes the Constitutional Council, a 10-member body comprising the Prime Minister, the speaker of Parliament, the leader of the opposition in Parliament, one member of Parliament appointed by the President, five persons appointed by the President upon nomination by both the Prime Minister and the leader of the opposition, of whom two must be members of Parliament, and one member of Parliament nominated by agreement of the majority of the members of Parliament who do not belong to the party of the Prime Minister or of the leader of the opposition. The Council recommends the appointment of the members of a number of independent commissions to the President and approves the appointment by the President of a number of high-ranking officials in the judiciary and the executive (see paragraph 5 above).

12. Chapter III, entitled "Fundamental rights", guarantees a limited set of civil and political rights, including the right to equality before the law and equal protection of the law (art. 12) and freedom from arbitrary arrest, detention and punishment and prohibition of retrospective penal legislation (art. 13). Articles 17 and 126 establish a right to seek remedy

[3] The report of the Subcommittee on the Judiciary is available at http://english.constitutionalassembly.lk/interim-report/126-interim-report.

for the infringement of any fundamental rights enshrined in the Constitution by executive or administrative action before the Supreme Court.

B. Legal framework

13. Since Sri Lanka declared independence in 1948, its legal system has developed into a complex system comprising a mixture of Roman-Dutch law, English common law and "personal laws" (Muslim, Kandyan and Thesavalamai) (see HRI/CORE/LKA/2008, para. 74).

14. The lower judiciary and courts are governed by the following main instruments, in addition to the relevant constitutional provisions: (a) the Judicature Act (No. 2 of 1978), as most recently amended by the Judicature (Amendment) Act (No. 10 of 2010); (b) the High Court of the Provinces (Special Provisions) Act (No. 19 of 1990) as most recently amended by the High Court of the Provinces (Special Provisions) (Amendment) Act (No. 54 of 2006); (c) the High Court of the Provinces (Special Provisions) Act (No. 10 of 1996); and (d) the Public and Judicial Officers (Retirement) Ordinance. This legal framework is further complemented by the Penal Code, the Code of Criminal Procedure Act and the Civil Procedure Code.

15. At the international level, Sri Lanka is a party to most international human rights treaties, including the International Covenant on Civil and Political Rights and its First Optional Protocol, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child and the Convention for the Protection of All Persons from Enforced Disappearance.

C. Court structure

16. The court structure is set out in article 105 (1) of the Constitution and is further detailed in section 3 of the Judicature Act.

1. Superior courts

Supreme Court

17. The Supreme Court is the highest court of the country and the final appellate jurisdiction; it was established and is regulated by the Constitution.[4] The Court also exercises jurisdiction in respect of constitutional matters, the protection of fundamental rights, election petitions and any breach of the privileges of Parliament, and it has a consultative jurisdiction. The Chief Justice with any three judges of the Supreme Court nominated by him or her have the power to adopt rules regulating generally the practice and procedure of the Court; these include rules on the enrolment, suspension and removal of attorneys-at-law and the rules of conduct and etiquette for such attorneys-at-law.

18. The Court is composed of the Chief Justice and between 6 and 10 other judges. All serve terms that last until a set retirement age and are appointed by the President upon authorization of the Constitutional Council, and can only be removed from office by order of the President after a parliamentary impeachment process on the ground of proved misbehaviour or incapacity.

Court of Appeal

19. The Court of Appeal too was established and is regulated by the Constitution.[5] The Court exercises, inter alia, appellate jurisdiction over cases of the High Court and other lower courts and tribunals or institutions. Its powers include that of issuing writs of habeas

[4] See, in particular, articles 105-111.C and 118-136.
[5] See, in particular, articles 105-111.C and 137-147.

corpus and of inspecting and examining, upon application, any record of any court of first instance.

20. The Court consists of the President of the Court and between 6 and 11 other judges. The judges serve terms that last until a fixed retirement age and are appointed by the President upon authorization of the Constitutional Council; they can only be removed from office by order of the President after a parliamentary impeachment process on the ground of proved misbehaviour or incapacity.

2. Courts of first instance

High courts

21. The High Court of Sri Lanka was established and is regulated by the Constitution, together with the Judicature Act.[6] The High Court is composed of no fewer than 10 and no more than 75 judges. The judges are appointed by the President upon recommendation of the Judicial Service Commission and after consultation with the Attorney-General. They are tenured until a set retirement age, unless they are removed from office by the President on the recommendation of the Judicial Service Commission. The High Court has both original and appellate civil and criminal jurisdiction.

22. Article 154P of the Constitution provides for the creation of provincial high courts in each province of the country. The Chief Justice nominates, from among the judges of the High Court of Sri Lanka, such number of judges as may be necessary to staff each such court; the Chief Justice can also transfer judges. Provincial high courts exercise, inter alia, original criminal jurisdiction; appellate and revisionary jurisdiction in respect of convictions, sentences and orders pronounced by magistrates or small claims courts and judgments, decrees and orders delivered by district courts or family courts within the province; and jurisdiction to issue writs of habeas corpus.[7]

23. The Commercial High Court was established in Colombo under the High Court of the Provinces Act (No. 10 of 1996) to hear in first instance certain civil actions involving commercial transactions, as well as matters of company law, intellectual property disputes and admiralty issues. In January 2016, a specialized high court was established in Colombo to expedite action on all cases pending under the Prevention of Terrorism Act. Another specialized high court charged with addressing cases brought forward under the Act operates in Anuradhapura.

District courts

24. District courts are courts of first instance and have original jurisdiction over all civil matters, including revenue, trust, matrimonial, insolvency and testamentary cases, when these are not expressly assigned to another court or authority. They are established in every judicial district and regulated by the Judicature Act. District court judges are appointed by the Judicial Service Commission and their retirement age is set out in the Public and Judicial Officers (Retirement) Ordinance.

Small claims courts

25. Small claims courts are set out in the Judicature Act for each judicial division. They have exclusive original jurisdiction to hear and determine civil actions in which the value of the debt, damage or demand, inter alia, does not exceed a sum specified by an order of the Minister for Justice. Judges are appointed by the Judicial Service Commission and their retirement age is determined in the Public and Judicial Officers (Retirement) Ordinance. It is unclear to the Special Rapporteur if the small claims courts have become operational.

[6] See, in particular, articles 105, 106, 111 and 111 A of the Constitution and chapters II and III of the Judicature Act.

[7] See article 154 P of the Constitution, the High Court of the Provinces (Special Provisions) Act, as amended, and the High Court of the Provinces Act.

Magistrate courts

26. The Judicature Act also establishes magistrate courts for each judicial division. Magistrate courts have original jurisdiction over criminal offences as stipulated in the Code of Criminal Procedure Act and the Penal Code, which also define their powers and duties. Magistrates are appointed by the Judicial Service Commission and their retirement age is determined in the Public and Judicial Officers (Retirement) Ordinance.

Other courts and tribunals

27. There are a number of administrative tribunals, such as agricultural tribunals and labour tribunals, that perform functions of a quasi-judicial nature as defined in the law.

IV. Challenges to a competent, independent and impartial justice system

A. Implementation of human rights treaties

28. Sri Lanka is a party to the great majority of international human rights treaties and has accepted the competence of certain treaty bodies to receive individual complaints. However, these instruments and their related jurisprudence are not enforceable before national courts until their content has been enacted in domestic legislation. This has given rise to a highly problematic situation, as many of the rights guaranteed in the treaties have not yet been enshrined in the Constitution or any other piece of legislation.

29. This extreme form of legal dualism is not sustainable, as it is well accepted in international law that a State party to a treaty may not invoke provisions of its domestic legislation as a justification for its failure to meet its treaty obligations. A legitimate expectation exists among Sri Lankans that, once the Government has ratified a human rights treaty, that treaty becomes applicable in Sri Lanka. The authorities have a duty to ensure that every person under its jurisdiction can enjoy and exercise the rights protected in these instruments and, if need be, seize the courts to enforce them, and that judicial decisions on such matters are respected and immediately implemented.

30. In this context, the Special Rapporteur wishes to stress that the decisions adopted by the United Nations treaty bodies, whose jurisdiction Sri Lanka has voluntarily accepted, should be enforced at the national level.

B. Strengthening the independence of the judiciary

31. The Constitution does not contain any provisions expressly recognizing the principle of the separation of powers and the importance of guaranteeing judicial independence. The judiciary has a crucial role to play in a democratic society based on the rule of law and fundamental human rights, including a role in upholding a system of checks and balances.

32. Many credible concerns relating to the independence, impartiality and competence of the judiciary were reported to the Special Rapporteur during her visit. There were periods during which the executive regularly exerted strong pressure on judges in order to influence their decision-making or block their actions. For instance, immediately prior to and during the impeachment process of then Chief Justice Shirani Bandaranayake, attacks against judges, but also lawyers, dramatically increased and turned violent. That pressure seems to have largely eased under the new government and no recent direct attack has been reported to the Special Rapporteur.

33. Judges are reportedly often offered government or other political offices after retirement. This practice raises concerns regarding possible conflicts of interest and casts doubt on the independence and impartiality of judges who may be hoping to obtain such positions.

34. Overall, judicial independence seems to have been gradually eroded over several decades owing to the conflict and its aftermath, despite certain positive reforms and advancements. There was nevertheless a clear perception during the visit that, after the change of government in 2015, some judges had started affirming their independence. This can partly be explained by the fact that judges apparently feel more secure in their authority and more confident in the belief that they will be adequately protected should they face undue pressure. However, a number of concerns relating to the lack of sufficient structural safeguards for the independence of the judiciary and the courts remain.

Selection and appointment

35. During her visit, the Special Rapporteur spoke with many individuals who expressed concern about the selection and appointment of judges, in particular the lack of transparency of the procedures and the important role played by the President, which opens the door to political manipulation and interference. The Special Rapporteur notes with concern that, while the role of the Constitutional Council was meant to mitigate the President's influence, the majority of the Council's members are politicians.

36. It is unclear how the competence of candidates is evaluated and what criteria are applied in the process of selecting superior court judges. In particular, it is very problematic that the Constitutional Council has yet to write down the procedures for the different appointments in which it has a role to play, whether in terms of recommending candidates for appointment or approving selected candidates.

37. The Judicial Service Commission has set out the rules for recruiting judges to the lower judiciary. According to those rules, in order to enter the judiciary, candidates must have been practising law for a minimum of three years, pass a written examination and then be successful in an interview. Once appointed, they have to undergo mandatory training at the Judges' Institute. A credible source told the Special Rapporteur that in the past there had nevertheless been instances of appointments that did not follow the established procedure.

38. A strict and rigorous recruitment process based on objective criteria is essential to ensure the highest competence of the judiciary, to avoid arbitrariness and political manipulation and to improve transparency and legitimacy, thereby building the public's confidence in the independence and impartiality of the justice system.

39. The Judicial Service Commission, which is composed of only three members, all from the Supreme Court, exercises a great deal of power and has many responsibilities. Its independence, technical capabilities and legitimacy could be enhanced by enlarging its composition to include judges of other courts and tiers and other eminent experts, such as retired judges, lawyers or academics.

Promotions

40. There seems to be neither a proper system to evaluate the performance of judges of first instance courts, nor established criteria to support promotions, which gives too much discretion to the Judicial Service Commission and can result in arbitrary decisions. Under such circumstances, promotions can also serve as undue means of influencing the work of judges and, ultimately, their independence.

Transfers

41. According to the information provided during the visit, first instance court judges are required to transfer to a different jurisdiction every four years, sometimes earlier. While transfers after a certain number of years can contribute to judicial independence, they may also be — and have been — used as retaliation. Transparency will improve if the Judicial Service Commission sets up and makes public clear guidelines.

42. Transfers also have negative consequences on the management of cases and the timely delivery of justice. In the opinion of the Special Rapporteur, measures should be taken urgently to limit or at least mitigate such negative consequences. The interests of justice should prevail over a blind application of administrative provisions. Furthermore,

support should be provided to facilitate family relocation in order to avoid negative repercussions on the lives of judges.

Conditions of work

43. Judges' salaries are relatively low and reportedly fail to attract the most qualified people. Moreover, the salary scale applied in the lower judiciary is the same as that applied to other public officers. It is essential that the remuneration of judges be adequate to lead a life that reflects the importance and dignity of their function. Judges' salaries should also be considered in their own context and not be assimilated to the salaries of other public servants whose functions are different and who can also hold other types of employment.

44. More resources are needed to allow judges to work in the best conditions. Adequate facilities, in particular workspaces and libraries, were mentioned as a priority by several judges.

Training

45. The Judges' Institute is in charge of the initial mandatory training of first instance court judges and offers a variety of on-the-job training programmes, including courses taught through video link. Some judges have the opportunity to travel abroad to pursue further studies or specialized training. These opportunities should be provided on the grounds of objective criteria, including to junior judges, ensuring a consistent and transparent selection of candidates for specific training sessions.

46. The Judges' Institute should offer more and new training opportunities, including on international human rights law, gender perspectives and women's rights, international humanitarian law, international criminal law, emerging legal issues, new technological developments and technical matters such as the analysis of complex forensic evidence. More resources should be allocated to the Institute so as to establish a larger and improved library and better facilities. The Institute's governing authorities should also be advised by a board composed of retired judges, academics and representatives from the Bar Association of Sri Lanka.

C. Judicial accountability

47. Judicial accountability goes hand in hand with judicial independence. Both are essential in a democratic society. While judges must enjoy certain privileges and immunities because of their function, they must also be accountable for their conduct if a system of checks and balances is to be maintained.

48. The judges of the superior courts can be removed from office by a decision of the President after an impeachment procedure before Parliament. The procedure, which is foreseen in the Constitution, is not regulated in any ordinary law and is implemented by Parliament through a standing order. The impeachment procedure is extremely politicized and characterized by a lack of transparency, by a lack of clarity in the proceedings and by a lack of respect for fundamental guarantees of due process and a fair trial, all of which undermine its legitimacy. Such politicization was exemplified by the impeachment of the Chief Justice in 2013.[6] The Special Rapporteur also notes with concern that the following Chief Justice was removed from office by executive order after the change of government in 2015. This sets a dangerous precedent of executive interference in the independence of the judiciary.

49. First instance court judges are subject to the disciplinary control of the Judicial Service Commission; in the case of High Court judges, the Commission makes recommendations to the President. The procedures in place do not seem to provide

[6] See http://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12969&LangID=E and http://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12799&LangID=E.

sufficient guarantees against arbitrary disciplinary measures, which, during certain periods, have reportedly been used to exercise undue control and to retaliate against judges refusing to align themselves with the government.

50. The lack of a proper code of conduct is also worrying. Detailed guidance needs to be provided to judges on the infractions that will give rise to disciplinary procedures. Judges should be suspended or removed only for reasons of incapacity or for behaviour that renders them unfit to discharge their duties. Having such a code would not only facilitate disciplinary proceedings, but also contribute to increasing confidence in the judiciary.

51. All disciplinary procedures must respect fundamental human rights principles, including the principle of due process and the right to appeal a decision, and should be conducted in accordance with a law passed by Parliament, which should set up a special panel composed of independent and impartial individuals and should enumerate the specific causes triggering misconduct and the corresponding sanctions, which must be proportionate and adequate.

D. Attorney-General's department, investigations and prosecutions

52. The Attorney-General acts both as the chief legal adviser of the Government and the head public prosecutor; he or she is appointed by the President upon approval by the Constitutional Council.[9] As the Council has not yet published its rules of procedure and evaluation criteria, the selection and appointment procedure lacks transparency. The appointment of State counsels, as well as their promotion and transfer, is the responsibility of the Public Service Commission, which consists of nine members appointed by the President on the recommendation of the Constitutional Council. Candidates must be attorneys-at-law and are selected after two rounds of interviews before two different boards.

53. The Attorney-General's department does not have investigative powers. All criminal investigations are conducted by members of the law enforcement forces, including police officers, who are also tasked with prosecuting individuals accused of crimes. These members of the law enforcement forces then report on progress made to the relevant magistrate court. State counsels are in charge of prosecutions for crimes to be tried before a high court. Proceedings before high courts can be initiated only by the Attorney-General's department.

54. Many concerns relating to the work of the department and of the police forces were brought to the attention of the Special Rapporteur. The low quality, lack of seriousness and slow pace of many investigations were seen as being very problematic and as leading to serious violations of due process principles. Police officers are not adequately trained to carry out their delicate functions, and many lack even basic technical knowledge. Too many investigations still rely exclusively on confessions, including confessions extracted under torture or ill-treatment.

55. It often takes many years for the Attorney-General's department to issue indictments after it has received the investigation material, even in non-conflict-related and non-political cases. For instance, it took seven years for the department to file an indictment in a child abuse case. Such delays have far-reaching consequences for both victims and defendants, especially when the latter are held in pretrial detention, and are simply unacceptable.

56. According to credible sources, certain cases, in particular those implicating security forces, especially members of the military, and cases related to gross human rights violations and corruption become stalled or are simply not investigated. The Attorney-General's department was also described as "rather lethargic" with regard to such sensitive cases. Moreover, in some cases, in particular those involving traumatic experiences for women or children such as rape and sexual violence, State counsels have displayed a shocking lack of sensitivity. They are in dire need of training, including specialized training

[9] See article 41.C of the Constitution.

in human rights. There is also no specific code of conduct for State counsels, who are bound by the same code of conduct as lawyers.

57. There is one State counsel in each provincial high court, but all procedures are centralized through the Attorney-General's department in Colombo, including those on deciding whether to indict or not. Efforts are reportedly under way to decentralize the work of the department, including by instating a new system of provincial supervision to ensure that prosecutorial matters are conducted properly without having to consult Colombo every time. Besides, the number of staff working in the Attorney-General's department is too low and contributes to the backlog of cases and delays in issuing indictments.

58. The Attorney-General's department acts as the representative of the State, which should by no means be equivalent to defending the government. However, there is a general perception that, first and foremost, the department defends the interests of the government, not the public's interest. This undermines the independence and credibility of the prosecution.

E. A justice system that reflects the diversity of society

59. Sri Lankan society is predominantly Sinhalese, with significant Tamil and Muslim minorities; in the Northern and Eastern Provinces, Tamils are in a majority position. Both Sinhala and Tamil are official languages. Yet, the diversity of the population is not reflected in the justice system: the overwhelming majority of staff of the judiciary, the Attorney General's department and the police forces are Sinhalese. This dominance reaches 100 per cent in many places throughout the country.

60. This situation raises the issue of language, as there are very few Tamil-speaking judges, State counsels and police officers. The majority of judicial proceedings are conducted in Sinhala, even in the Northern and Eastern Provinces. While court interpretation is sometimes available, its quality is said to be poor. A similar serious concern relates to the fact that police officers are rarely in a position to record complaints, collect evidence and carry out interrogations in Tamil, even in provinces with a Tamil majority, and have to resort to very poor transcriptions and translations into Sinhala. Sometimes, interpretation and translation services are not available, so statements in Tamil are simply not recorded. This puts into question the accuracy of the records and the quality and, most importantly, the legality of the investigations. The lack of interpretation and translation services also means that, very often, the accused do not understand their rights. In some cases, judgments are issued in Sinhala without being translated into Tamil and, as a result, lawyers and their clients do not understand the decision. These language problems ultimately have a dramatic impact on access to justice and respect for fair trial and due process guarantees for Tamil-speaking people, and need to be addressed urgently.

61. The representation of women in the legal professions should also be improved. Although close to one third of judges in the country are women, their number decreases the higher up in the hierarchy one looks.

62. Sri Lanka is a pluralistic society. Its justice system should be composed of people from all sectors and should be perceived as being fair and legitimate by all Sri Lankans. This will also ensure a more balanced and impartial perspective on the matters before the courts, eliminating barriers that have prevented some judges from addressing certain issues fairly.

F. Independence of lawyers

63. According to the Constitution and the Judicature Act, the Supreme Court is responsible for and makes rules on the admission, enrolment and discipline, including the suspension and removal, of attorneys-at-law.[10] However, neither the Constitution nor the

[10] See article 136 (1) (g) of the Constitution and articles 40-44 of the Judicature Act.

Judicature Act mention the independence of lawyers. Furthermore, it is not possible to seek remedy or appeal against decisions made by the Supreme Court, including disciplinary measures. Membership in the Bar Association of Sri Lanka, a non-statutory body, is optional.

64. The Bar Association has been, during certain periods, strongly divided along political lines. The politicization of the Association is a source of great concern. The fundamental role of such associations is to promote and protect the independence and the integrity of the legal profession and to safeguard the professional interests of lawyers.

65. The general environment in which lawyers work, including their sense of security, was said to have greatly improved with the change of government in 2015. Before that, lawyers defending former members of the Liberation Tigers of Tamil Eelam and persons accused of terrorism-related offences were regularly branded as traitors and their lives threatened. Any threats against the security of lawyers should be immediately and thoroughly investigated, and appropriate action taken. It was reported that the Criminal Investigation Division of the police had kept files on lawyers defending such "sensitive" cases. The Special Rapporteur calls on the authorities to immediately and seriously investigate such allegations and to take appropriate measures to guarantee the security and independence of lawyers in the future.

G. Right to a fair trial, due process of law and judicial delays

66. The Special Rapporteur expresses great concern about the serious issues affecting fair trial and due process guarantees — ranging from security legislation unduly restricting rights to dramatic judicial delays — reported during her visit.

Access to a lawyer

67. Having prompt access to a lawyer is a precondition for the effective realization of the right to a fair trial and for securing other rights. It represents an important safeguard against arbitrary arrest or detention, unlawful deprivation of liberty and torture and other cruel, inhuman or degrading treatment or punishment.

68. Usually, people who have been arrested are given access to a lawyer only from the moment they are presented to a magistrate, normally within 24 hours of their arrest. In 2012, following an application on the violation of fundamental rights settled by the Supreme Court, the Inspector General of Police issued rules under the Police Ordinance acknowledging the right of a lawyer to represent his or her client at a police station and requiring police officers to facilitate such representation.[11] In August 2016, a draft bill amending the Code of Criminal Procedure Act was presented; the amendment aimed to allow access to a lawyer only after the first statement of the person arrested had been recorded by the police. Fortunately, following complaints from the Bar Association, the Human Rights Commission and civil society, the amendment was withdrawn, thus avoiding a serious regression on the fundamental right to a fair trial.

69. Moreover, while lawyers reported that they had no problem gaining access to clients held in ordinary police stations or detention centres, they said they needed authorization, which could take months to obtain, to visit clients held at the Terrorism Investigation Division in Colombo and in certain detention centres, such as the one in Boosa, where people accused of terrorism-related crimes were often detained. Such restrictions are unacceptable. Suspects and detainees should have unhindered and regular access to their lawyers, regardless of the place of detention and the charges for which they are held.

Prevention of Terrorism Act

70. At the time of writing, the Prevention of Terrorism Act had not yet been repealed, despite repeated calls for the authorities to do so immediately, including from the Special

[11] See the Police (*Appearances of Attorneys-at-Law at Police Stations*) Rules, 2012.

Rapporteur and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment at the end of their visit. The Act, adopted in 1979, imposes severe restrictions on courts' jurisdiction and authority to prevent abusive detention and torture and seriously undermines the fundamental right of defendants to a fair trial. The continuation of a normative framework that contributes to violations of fundamental human rights cannot be justified.

71. If any specific legislation is to be adopted to replace the Act — and the Special Rapporteur is not convinced of that necessity — it must be in line with international human rights law and standards, in particular safeguards against arbitrary arrest and detention, unfair trials and torture.[12]

Judicial delays

72. The Special Rapporteur was, on many occasions, told of judicial delays that were nothing short of dramatic. Criminal proceedings could drag on for 10 to 15 years, even in cases that were not politically sensitive. For instance, a lawyer mentioned being involved in a trial for rape that had recently been completed after 15 years. There were also examples of civil cases that had been pending for more than 30 years. Divorce matters could take eight or more years to be resolved. Such delays clearly amount to a denial of justice, which especially affects the lives of victims, their families and persons deprived of their liberty.

73. Cases were regularly postponed, including owing to the transfer of judges, and judges were not held accountable for the delays they incurred. Besides, it would seem that there was an insufficient number of judges in the country to allow them to tend adequately to their workload.[13] The Attorney-General's department also largely contributed to judicial delays.

74. Such a severe situation can only be addressed with the adoption of a comprehensive set of measures, designed and implemented in consultation with all stakeholders, in particular with judges, staff of the Attorney-General's department and lawyers. The Judicial Service Commission reportedly issued new circulars, to be enforced on 1 November 2016, on expediting old cases. In that context, the Special Rapporteur notes the concerns expressed by the Bar Association about the practicability of implementing those circulars in a letter addressed to the Commission on 24 October 2016.[14]

75. Establishing family courts throughout the country could contribute to reducing the workload of district courts. Increasing the use of mediation, including by making it mandatory in certain types of cases, could also decrease the number of cases reaching the courts. Such steps should be accompanied by measures to improve the quality of mediation, in particular the legal training and integrity of board members.

Plea bargaining

76. The Special Rapporteur was told that judges frequently pushed defendants to plead guilty. Defendants were made to believe they could get a lighter sentence by pleading guilty, which was not always the case, and that their sentence would be shorter than the time they would spend in pretrial detention. When defendants plead guilty, judges can expedite their case and improve their statistics. The Special Rapporteur is alarmed by this practice, which seems to demonstrate a disregard for the interests of justice.

Impartiality in sentencing

77. Concerns regarding the lack of guidelines on sentencing were reported to the Special Rapporteur. Judges should decide their cases on the grounds of the facts and of the evidence produced and in the light of the law in force at the time of the facts.

[12] See, in particular, the recommendations contained in the reports of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (for example, A/HRC/16/51 and A/HRC/22/52 and Corr.1).

[13] There are 335 judges for a population of over 22 million people.

[14] Available at www.basl.lk.

Publicity

78. Only the superior courts publish their judgments on their respective websites. The publication of all court judgments and decisions should be mandatory and automatically done, as a means to reinforce the credibility of the judiciary and build public trust.

Contempt of court

79. Contempt of court, a measure enshrined in the Constitution, was said to have often been abused in the past to impose sanctions *inaudita altera parte*, rather than for its intended purpose, which is to preserve the authority and dignity of judges and courts and prevent the undermining of public confidence in the administration of justice. Contempt of court should be used restrictively and not as a tool to hinder legitimate criticism of judicial organs in a democratic context.

H. Access to justice, protection of victims and witnesses and impunity

80. Access to justice constitutes the means for realizing and restoring rights and is also a fundamental human right in itself. Providing access to justice for all is explicitly included in Sustainable Development Goal 16. To realize that right, the barriers currently faced by many Sri Lankans in reaching the courts, including the limited number of judges, judicial delays and issues related to language, should be urgently recognized and measures should be taken to remove them.

Legal Aid Commission

81. In a country lacking public defence services, the Legal Aid Commission is at the forefront of efforts to provide access to justice for all in Sri Lanka. The Commission is a governmental institution with more than 400 legal officers on staff that was established in 1978 to provide legal advice to and represent people, in both criminal and civil matters, without sufficient financial means.[15] There are 76 legal aid centres throughout the country. The majority of the cases the Commission deals with are related to divorce and labour matters. There is also a special unit that represents victims in cases of human rights violations. The Commission is also involved in outreach activities to inform people about their rights.

Fundamental rights jurisdiction

82. The Supreme Court has the authority to receive applications from persons seeking remedy for the infringement by executive or administrative action of any of the fundamental rights enshrined in the Constitution.[16] If it finds that a violation has occurred, the Court can order compensation and make recommendations, but its decisions cannot be appealed. While this is an important avenue for lodging complaints for violations of fundamental rights, it fails to reach the most vulnerable. Indeed, many victims cannot afford to travel to Colombo and hire a local lawyer to file the application, while some others fear reprisals if they were to do so. There are also language barriers and a time limit of one month, which can prove insurmountable. Some police officers have allegedly offered money to victims or their families agreeing not to file a complaint. Moreover, according to the Chief Justice, there is a backlog of approximately 3,000 applications.

Human Rights Commission

83. In 2015, new and highly credible and competent commissioners were appointed to head the Human Rights Commission. The Commission can receive and investigate complaints of human rights violations and make recommendations thereon. While it is an important mechanism that should be further strengthened, especially as it is gaining the public's trust, the Commission can only supplement the work of the courts, not replace it.

[15] See Legal Aid Law (No. 27 of 1978).

[16] See articles 17 and 126 of the Constitution.

Victim and witness protection

84. In general, judicial proceedings, in particular criminal proceedings, do not consider the victim. All judicial actors should have the victim in mind in all aspects of their work. The lack of a proper legal framework for victim and witness protection has long been identified as a critical issue in the country and as a factor that has contributed to a high level of impunity.

85. On 7 March 2015, Parliament finally adopted the Assistance to and Protection of Victims of Crime and Witnesses Act (No. 4 of 2015), which had been promised by the new government. The Act, which is based on a bill that was prepared in 2007, has been widely criticized; in particular, serious concerns have been expressed about the independence of its operating body, which is located within the institutional hierarchy of the police despite the fact that security forces have been identified as responsible in a number of serious human rights violations and abuses, including in the majority of torture-related cases (see CAT/C/LKA/CO/5, para. 17). The Government's commitment to reviewing the Act[17] has not yet concretized and the establishment of a victim and witness protection division is going ahead as originally planned.

86. In many cases, victims live in close proximity to their abuser and are therefore particularly vulnerable and afraid. In some regions, especially in the north of the country, the military continues to exercise control over people's lives. If someone reaches out to the local courts or travels to Colombo to file a complaint, the military knows about it. The climate of fear is still palpable. Victim and witness protection will continue to be a determining issue in the context of common crimes, abuses and violations committed by members of the security forces, as well as in the context of transitional justice mechanisms that have been created, such as the Office of Missing Persons, or that will be established, such as a truth-seeking mechanism or specialized court.

Persisting impunity

87. The failure to hold perpetrators accountable for gross human rights violations, serious violations of humanitarian law and international crimes in Sri Lanka has long been documented. Furthermore, while the conflict lasted, there was virtual impunity for any abuse committed by the police or the security forces. Impunity is so widespread that it has become a normal occurrence, thereby contributing to shattering the public's confidence in its judiciary. Since the change of government, some positive steps seem to have been taken, as five new cases were reportedly being investigated at the time of the visit (in all five cases, the military intelligence apparatus was allegedly involved). In a now famous case before the High Court in Jaffna, a military officer was condemned to 25 years in prison for rape. While that case is still an exception, it gives hope that justice can be done.

I. Transitional justice

88. Over the years, Sri Lanka has established a large number of ad hoc commissions to inquire into politically sensitive crimes, shed light on past atrocities and deal with lessons learned. However, these commissions, whose reports have rarely been made public, have not brought the results and changes hoped and have even, by their very existence, jeopardized the development or reinforcement of competent and independent institutions.

89. The authorities should be commended for having committed themselves to embarking on a difficult journey to set up transitional justice mechanisms to deal with its past in a comprehensive way.

90. Transitional justice mechanisms are important for building a sustainable future for the country and all its communities, and for preventing the recurrence of violations. The justice component of the transitional justice process must be independent, impartial, credible and effective. During her visit, the Special Rapporteur observed that many people

[17] See, for example, Human Rights Council resolution 30/1, para. 9.

did not trust that their justice system would deliver justice, not even in non-sensitive cases. The capacity of the police, State counsels and judges to independently and professionally deal with extremely complex cases involving serious violations of international human rights law and international humanitarian law, as well as international crimes, has yet to be built.

91. Attention should be paid simultaneously to transitional justice measures, in particular the special judicial mechanism, and to the objective of strengthening the independence of the country's "regular" justice system. Reforming the administration of justice in the light of international norms and standards regarding its independence, including possible vetting processes of current or future judges, will improve the functioning of the justice system for all and contribute to guaranteeing the non-recurrence of past atrocities.

92. There is, however, a perception that law-making processes lack transparency. Civil society organizations and others have expressed serious concern in relation to deficiencies of good governance in legislative processes. For example, while the legislation to establish the Office of Missing Persons was adopted by Parliament in August 2016, six months later it had not yet been published in the official gazette. Information received suggests that new amendments are being discussed in relation to the already adopted legislation; however, no information has yet been provided publicly on that matter. The Special Rapporteur cautions that when law-making is done through irregular processes, rumours and suspicions flourish, easily feeding into narratives that are counterproductive to democratic reform.

J. Constitutional reform

93. The National State Assembly has launched a process to review the Constitution, which presents an opportunity that should not be missed to confer constitutional status to provisions safeguarding the independence and impartiality of the administration of justice, thereby contributing to reinforcing the independence and impartiality of the justice sector as a whole. It is also important to highlight that, in a transitional justice context, constitutional reform contributes to guaranteeing the non-recurrence of serious human rights violations and other atrocities.

94. The six subcommittees set up by Parliament to look into particular matters issued their reports in November 2016. Overall, the amendments suggested in the report of the Subcommittee on the Judiciary seem positive. The Special Rapporteur welcomes in particular the proposition to establish a constitutional court, since the current constitutional review jurisdiction of the Supreme Court is clearly inadequate. In that context, she calls on the Government to consider introducing an effective individual complaints procedure in relation to human rights violations. Looking ahead, the Special Rapporteur stresses that more efforts are needed to grasp the complexity of the issues at stake and calls for a more comprehensive and detailed review of the Subcommittee's report. At the time of writing, it was unclear what the next steps in the process would be. To give legitimacy to the constitutional reform process, it is essential to keep the public continuously informed about the next steps. Regarding the reforms related to the administration of justice, wide consultations with the legal community should be held, to allow members of that community to make substantive comments.

V. Conclusions

95. **Sri Lanka is at a critical moment in its history. While the armed conflict ended in 2009, after more than 25 years many of the structures of a nation at war remain in place. The fabric of Sri Lankan society was left ravaged and the justice sector still needs to tend to its deepest wounds.**

96. **In general, the administration of justice should be more transparent, decentralized and democratic. The country needs to conduct a strict exercise of introspection, so as to improve the independence, quality and credibility of its judiciary, the Attorney-General's department and the police forces. A significant**

change in the attitude and sensitivity of many members of the legal professions, in particular the judiciary, towards reforms and human rights will be necessary. Guidance on how to go about strengthening the independence, impartiality and competence of those involved in the administration of justice can be found in the present report, but also in an important number of international and regional instruments, including the Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government endorsed in 2003.

97. While the democratic gains of the past two years must be welcomed, it is important to recognize that much more could and should have been done to manifest a commitment to genuine reform, in particular in the justice sector, and to create meaningful and participatory transitional justice mechanisms. More tangible reforms are expected and necessary before the country can be considered to be on a stable and sustainable path towards democracy and to be governed by the rule of law. It is important to accelerate the process of positive change within a comprehensive and inclusive framework, otherwise the momentum for such reform could be lost.

98. Building a justice system that all sectors of society will trust and be able to rely on to defend and enforce their rights will take time. Bold steps need to be taken, as a sign of the authorities' commitment to address the atrocities of the past and, above all, the structures that allowed such atrocities to happen. It is important to remember that justice must not merely be done, but must also be seen to be done.

VI. Recommendations

99. The recommendations below should be read in conjunction with the recommendations contained in the report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/HRC/34/54/Add.2).

100. Urgent measures should be adopted by the authorities to give effect to all the rights protected in international human rights treaties that have been ratified and are therefore in force. The authorities should also enforce the decisions adopted by the United Nations treaty bodies whose jurisdiction it has voluntarily accepted.

101. The chapter on fundamental rights of the Constitution should be thoroughly reviewed to ensure that civil, cultural, economic, political and social human rights are protected, in line with the international human rights obligations of the State.

102. The Constitution should clearly and expressly recognize the fundamental principle of the separation of powers, establish checks and balances and guarantee the independence of the judiciary and the courts, as well as of the legal profession.

103. The composition of the Constitutional Council should balance the number of active politicians with representation from civil society, the Bar Association and academia so as to avoid the politicization of the appointment processes.

104. The Constitutional Council should set out and publish its rules of procedures, including the criteria used to evaluate candidates' suitability for a given position, which should be scrupulously and consistently applied.

105. The selection and appointment of judges of both superior and first instance courts should be transparent at all stages and follow clear recruitment criteria, including technical requirements. Proper evaluation systems should also be established and published.

106. Serious considerations should be given to broadening the composition of the Judicial Service Commission, in particular by including judges of other courts and tiers and other experts, such as retired judges, lawyers and members of academia.

107. Decisions on promotions should be reached following a fair and transparent evaluation procedure based on objective factors, in particular the merits, integrity, experience and seniority of the candidates; these factors and procedures should be made public.

108. The Judicial Service Commission should review and clarify its policy regarding the transfer of first instance court judges. In particular, it should look into the seriously negative impact that such transfers can have on the timely delivery of justice, and set up and publicize objective criteria, which should take into account the specific expertise of judges.

109. Judges should be remunerated with due regard for the responsibilities, the nature and the dignity of their office; their salary scale should be different from the one used for other public officers.

110. Special measures should be urgently taken to redress the discrepancies in terms of available material resources between the different courts; particular attention should be paid to courts located in the Northern and Eastern Provinces.

111. Any impeachment procedure should be regulated by a law passed by Parliament, which should provide for a judicial determination of the merits of the causes triggering the removal procedure, and the findings of alleged misconduct. Legislation should explicitly stipulate what constitutes misbehaviour, in line with the international standards set out in the Basic Principles on the Independence of the Judiciary and the Bangalore Principles of Judicial Conduct. The final decision should lie in the hands of an independent and impartial panel or appellate tribunal, which should decide on the existence of misbehaviour in the given case. So as to avoid any selectivity in the composition of that panel, it may be decided that, when retiring, judges are automatically enrolled to serve as members of the impeachment panel or appellate tribunal.

112. All disciplinary proceedings should be conducted in a way that respects due process and allows for an independent review of the decisions made. The specific causes triggering misconduct and the corresponding sanctions, which must be proportionate and adequate, as well as the procedures to follow, should be established in law. The creation of a special disciplinary panel, whose independence and impartiality must be ensured, should be seriously considered.

113. A code of conduct for judges, in line with international standards such as the Bangalore Principles of Judicial Conduct, should be adopted in consultation with members of the judiciary; its drafting should be entrusted to an independent panel composed of both retired and sitting judges, lawyers and academic experts.

114. The appointment of the Attorney-General should be clearly set out in law and include objective selection criteria to ensure the transparency of the procedure and the credibility and independence of the office.

115. The process for appointing State counsels should be reviewed to increase its transparency and impartiality and should include objective evaluation criteria.

116. The legality of investigations should be closely monitored through effective judicial oversight.

117. The Attorney-General should issue clear and proper guidelines for the investigation of crimes and the prosecution of perpetrators, including victim-oriented protocols that respect women's and children's rights. Specific guidelines should be developed for the effective investigation of gross violations of international human rights law and serious violations of international humanitarian law and for the prosecution of perpetrators of such crimes.

118. The Attorney-General's department should be supervising the investigation of crimes tried before the high courts.

119. Both police officers and State counsels should be adequately trained to discharge their functions; training sessions should include specialized training in human rights, including on integrating gender perspectives into their work, as well as technical training.

120. **A specific code of conduct for State counsels, in line with international standards such as the Guidelines on the Role of Prosecutors, should be urgently developed.**

121. **Urgent measures should be taken to reduce delays in the investigation of crimes and the indictment of alleged offenders.**

122. **Measures to decentralize the work of the Attorney-General's department should be encouraged and be taken in consultation with all parties involved in criminal prosecutions.**

123. **Serious consideration should be given to reviewing the roles and powers of the Attorney-General with a view to reinforcing the independence of that office and reducing conflicts of interest.**

124. **An independent special office should be established to handle the prosecution of State officials.**

125. **Urgent measures should be taken to allow people from different sectors of society to be part of the justice system and to have access to it; those measures could include the following: reviewing recruitment, selection and appointment procedures, including evaluation criteria; making language requirements mandatory for certain positions; considering language abilities when filling positions in mostly Tamil-speaking areas; identifying barriers preventing minorities from reaching positions in the justice system and devising strategies to overcome them; and ensuring adequate access to secondary and university education.**

126. **Qualified and high-quality interpretation and translation services should be made available in every court and at all stages of judicial proceedings; police forces should also have access to quality interpretation and translation.**

127. **Sri Lanka should set up and implement a plan of action to improve women's representation in all legal professions, ensuring in particular the equal representation of women at all levels of the justice system.**

128. **The independence of lawyers, and the vital role lawyers play in upholding the rule of law and promoting and protecting human rights, should be recognized in law.**

129. **The procedures for the admission, enrolment and discipline of attorneys-at-law should be revised in consultation with lawyers and representatives of the Bar Association, which should oversee the authorization to practise law and the enforcement of disciplinary measures. Any decision should be reviewed by an independent court. Disciplinary proceedings, including disbarment, should provide for all guarantees of fairness and due process, including the right to an independent review.**

130. **Any threats to or attacks against lawyers, or any improper interference in their work, should be promptly investigated and sanctioned. The authorities should also ensure the security of lawyers and their families.**

131. **All those participating in the justice system must be adequately educated and trained. Education and training on human rights should be mandatory. There should also be opportunities for continuing education and on-the-job training.**

132. **Law curricula should include mandatory courses on international human rights law, including gender perspectives and women's rights, international humanitarian law and international criminal law.**

133. **Legislation should be urgently amended to allow every person arrested or detained to have access to a lawyer of his or her choice from the moment of arrest and every person arrested or detained should be immediately informed of that right and of the avenues available in case he or she cannot afford to pay for a lawyer. The right to have access to a lawyer from the moment of arrest should also be enshrined in the Constitution.**

134. The Prevention of Terrorism Act should be immediately repealed; any replacing legislation, if at all necessary, should fully respect international human rights law and standards.

135. The authorities should study the backlog of tribunals and analyse the causes of judicial delays to design a comprehensive plan to improve the efficiency of the administration of justice without encroaching on the interests of justice. The design and implementation of any measures should be done in consultation with all stakeholders, in particular, judges, lawyers and State counsels.

136. The practice of plea bargaining should be clearly regulated in legislation. Defendants should never be pressured into pleading guilty and should be informed in a language they understand of all the consequences and implications of pleading guilty.

137. Legislation should be enacted to define a clear and precise scope and application for the offence of contempt of court, identifying behaviours constituting contempt of court and setting up a procedure to deal with such cases.

138. The Supreme Court should also sit in other parts of the country, including in the Northern and Eastern Provinces, to facilitate access to justice and raise the awareness of judges to the specific situation of people in regions outside of the capital, and contribute to building trust in the justice system.

139. The authorities must adopt special measures to ensure that persons in particularly vulnerable situations, such as children, people living in remote areas and victims of sexual violence, have meaningful access to the justice system and other complaint procedures; such measures include the provision of qualified legal aid.

140. The work of the Legal Aid Commission should be duly acknowledged and supported, including through the allocation of additional resources.

141. The high courts should be entrusted with the power to receive applications related to violations of fundamental rights; the time limit to file an application should be extended and an appeal procedure set up.

142. The Human Rights Commission must be supported at the highest levels and receive additional human and financial resources in order to strengthen and expand its activities, reform its methods of work and adequately train its staff.

143. The victim and witness protection mechanism should be urgently reviewed and its independence strengthened so as to provide meaningful protection.

144. Comprehensive measures should be urgently adopted to address impunity. Those measures should not be limited to the transitional justice context but should be aimed at the whole justice chain.

145. The authorities should take concrete measures to implement Human Rights Council resolution 30/1 and the recommendations contained in the report of the Office of the United Nations High Commissioner for Human Rights on its investigation on Sri Lanka, in particular those related to fighting impunity and ratifying the Rome Statute of the International Criminal Court.

146. The independence, impartiality, competence and credibility of the special judicial mechanism envisaged as part of the different transitional justice measures, including the prosecution and investigation sides of the mechanism, should be ensured.

147. The constitutional reform process should be continued in a transparent manner; relevant stakeholders should remain involved and the public should be kept informed at all stages.